

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN SHAWN STUBBS,

Defendant.

Case No. 2:19-cr-00142-APG-DJA

REPORT AND RECOMMENDATION

Presently before the Court is Defendant Kevin Stubbs' Motion to Suppress Evidence Obtained Directly or Indirectly from the Government's Illegal Seizure and Search of his Cell Phone, filed on March 13, 2020. (ECF No. 77). The Government filed a Response on March 27, 2020. (ECF No. 78). Stubbs filed a Reply on April 3, 2020 (ECF No. 79). The Court conducted an evidentiary hearing on June 12, 2020. (Mins. of Proceedings (ECF No. 86)). At the hearing, the Government called two witnesses and offered four exhibits that were admitted. Stubbs also called two witnesses who testified regarding the alleged search. At the conclusion of the hearing, the Court indicated it would file a written Report and Recommendation and took the matter under advisement. This Report and Recommendation follows.

I. BACKGROUND

Stubbs is charged in a one count Superseding Indictment filed on July 31, 2019 with Felon in Possession of a Firearm in violation of Title 18 U.S.C. §§922(g)(1) and 924(a)(2). The charge resulted from law enforcement efforts to locate and arrest Stubbs for state charges, including Assault with a Deadly Weapon, Carry Concealed Weapon/Firearm, and Prohibited Person Possession of a Firearm. After Stubbs was located, law enforcement found a Glock pistol in the passenger side of a vehicle, from which Stubbs ran when law enforcement attempted to arrest him.

1 During the course of attempting to locate Stubbs, officers sought and obtained a pen
2 register/trap and trace for Stubbs' telephone. Using information obtained from this pen register,
3 law enforcement identified a second phone number they believed was possibly related to the first
4 phone number and Stubbs. Officers sought and obtained a second pen register, and included,
5 among other information, the statement that the second phone number was obtained after a search
6 of Stubbs' phone which had been left at a residence.

7 Based upon this, Stubbs filed a motion to suppress all of the evidence seized after the
8 illegal search of his phone, including the gun which was found at the time of his arrest nearly one
9 week after the alleged search of the first phone, as fruits of the poisonous tree. (ECF No. 77).
10 The Government opposed the motion arguing that the phone was never illegally searched. (ECF
11 No. 78). Alternatively, it argued that even if it was, the information supposedly seized and used
12 was available from an independent source. As such, the Government contends that none of the
13 evidence obtained from Stubbs' arrest five (5) days after the purported search of the phone
14 qualifies as fruits of the poisonous tree. Stubbs replied that there is nothing in the affidavit for the
15 second pen register indicating that the information was received from an alternate source. (ECF
16 No. 79). Stubbs further argued that there was not an independent untainted source for this
17 information and that clearly evidence seized at the time of Stubbs' arrest was directly related to
18 the fruit of the poisonous tree and therefore should be suppressed. Finally, he argues that the
19 Government did not provide any evidence to support their claim that the phone was not searched
20 so an evidentiary hearing was required.

21 The Ninth Circuit has held that a district court must hold an evidentiary hearing if the
22 moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the court
23 to conclude that relief must be granted if the facts alleged are proved. *See United States v.*
24 *Howell*, 231 F.3d 615, 620 (9th Cir. 2000) (citing *United States v. Walczak*, 783 F.2d 852, 857
25 (9th Cir. 1986)); *see also United States v. Irwin*, 613 F.2d 1182, 1187 (9th Cir. 1980); *United*
26 *States v. Carrion*, 463 F.2d 704, 706 (9th Cir. 1972). The court need not hold a hearing on a
27 defendant's pre-trial motion "merely because a defendant wants one. Rather, the defendant must
28 demonstrate that a significant disputed factual issue exists such that a hearing is required."

1 *Howell*, 231 F.3d at 621 (internal citation omitted). The determination of whether an evidentiary
 2 hearing is appropriate rests in the reasoned discretion of the district court. *See United States v.*
 3 *Santora*, 600 F.2d 1317, 1320 (9th Cir. 1979).

4 The Court considered the parties' factual dispute set forth in the briefing regarding where
 5 the second phone number was obtained and whether or not officers reviewed Stubbs' phone in
 6 violation of the first pen register order. The Court found an evidentiary hearing was necessary to
 7 resolve the factual dispute regarding the attempted location of Stubbs, the circumstances
 8 regarding the information in the affidavit requesting the pen register for the second phone, and
 9 whether or not law enforcement ever seized and searched the phone at issue in the first pen
 10 register request in violation of that order. The evidentiary hearing resolved those issues to the
 11 Court's satisfaction and the Court will now set forth its findings.

12 **II. TESTIMONY AND EVIDENCE**

13 **A. Government's Witnesses**

14 The Government called two Las Vegas Metropolitan Police Department (LVMPD)
 15 officers assigned to the team tasked with locating and arresting Stubbs. First, Officer Blake
 16 Ferron testified that he has been with the department for five (5) years (just under four (4) years at
 17 the time of the search in question). He was assigned to a Flex team which dealt with narcotics
 18 crimes and fugitives. Officer Ferron was contacted by other officers to assist in locating Stubbs
 19 who was wanted for various state crimes. Additionally, Officer Ferron testified that he obtained a
 20 phone number (Phone No. 1) associated with Stubbs and confirmed through Clark County
 21 Detention Center (CCDC) phone records¹ that the number was tied to a phone being used by
 22 Stubbs. Then, he prepared a request for a search warrant and order for a pen register/trap and
 23 trace with real time position for Phone No. 1. When that was approved, Officer Ferron explained
 24 that the warrant is given to the service provider who then provides real time emails from the
 25 cellular phone to the requesting officer indicating the location of the phone and call data,

26
 27 ¹ Officer Ferron testified that telephone calls from inmates at CCDC are recorded and inmates and
 28 recipients of calls are notified of same. Officer Ferron listened to the calls from the relevant numbers and
 confirmed the caller using the number was "Kevin."

1 including what numbers call the phone, the duration of the phone call, and where the phone was
2 located during those calls.

3 Further, Officer Ferron testified that this information is received by the officers requesting
4 it via email real time as the phone calls occur. The location notification occurs approximately
5 every fifteen (15) minutes, again received via email. Officer Ferron also testified that those
6 emails are generally deleted shortly after they are received because they are simply too
7 voluminous and will fill up his inbox, especially when conducting multiple investigations.
8 Officer Ferron further testified that the information he receives in the emails are kept in an
9 activity report, which serves as a log keeping the date, time, duration, call type, direction and
10 contact identification of every call that is provided to him in an email. (Government's Exhibit C).

11 Officer Ferron testified that by using this information, he was able to determine that Phone
12 No. 1 was in the vicinity of the 100 block of South Martin Luther King Drive where a Siegle
13 Suites Apartment building was located. Further investigation revealed that Stubbs' mother
14 resided at that location. Officer Ferron testified that on March 29, 2019 he went to the front
15 office of the apartment complex and confirmed that Stubbs' mother still lived there. Then, he
16 arranged surveillance to watch the unit where Stubbs' mother lived to determine whether or not
17 Stubbs was present. Officer Ferron testified that, while he was there, he talked with management
18 for the apartment complex, went to an apartment similar to the one Stubbs' mother rented so he
19 could see the layout of the apartment for a potential search of it, and thereafter simply provided
20 additional surveillance while other officers conducted further investigation.

21 Subsequently, Officer Ferron testified that, at some stage, Stubbs' mother exited her
22 apartment to take out the garbage. Other officers approached her, contacted her and asked if
23 Stubbs was in her residence. They were told Stubbs was not there. Officer Ferron testified that
24 other officers then entered the apartment and confirmed that Stubbs was not present. Officer
25 Ferron testified that officers were in the apartment for less than ten (10) minutes as confirmed by
26 Government's Exhibit B. Officer Ferron testified that he never entered the apartment, he never
27 searched the apartment, and he had no contact with any of the residents for the apartment. He
28 also testified that he was not looking for a phone and none of the other officers were looking for a

1 phone when they went in. Indeed, Officer Ferron testified that he did not need Stubbs' Phone No.
2 1 because he had the information from it as a result of the pen register/trap and trace warrant that
3 he had previously received.

4 Officer Ferron further testified that, while he was at the apartment complex, he had his
5 computer with him and was monitoring the pen register from Phone No. 1 in real time. He
6 explained his reasoning for doing so was because friends or family may contact fugitives and
7 notify them that law enforcement is at a location where they might be so that the fugitives can
8 take evasive action. While monitoring the pen register, Officer Ferron testified that a specific
9 number made a few contacts within a short period of time. Officer Ferron testified that action on
10 Phone No. 1's pen register made him think that perhaps that specific number was contacting a
11 phone utilized by Stubbs. Officer Ferron testified that he identified this second phone number as
12 one of interest (Phone No. 2).

13 Officer Ferron testified that he tried to confirm that Phone No. 2 might be related to
14 Stubbs, so he ran it through the phone system at CCDC and again confirmed that an individual
15 utilizing that number was referred to as Kevin. Officer Ferron then sought a second search
16 warrant and order for pen register/trap and trace with real time position location warrant for
17 Phone No. 2. In that affidavit, Officer Ferron stated that while making contact at the address
18 where Stubbs' mother lived, it was determined that Stubbs had left the phone at the residence.
19 Officer Ferron stated in his affidavit that he observed Phone No. 2 make three (3) contacts to
20 Phone No. 1, clearly implying that he received that information from reviewing Stubbs' phone,
21 presumably in violation of the search warrant order for that phone. (See Exhibit D). After the
22 second search warrant was approved, Officer Ferron testified that they began monitoring Phone
23 No. 2. As a result of the location information from Phone No. 2, officers were able to locate
24 Stubbs on April 9, 2019.

25 Officer Ferron testified that after conducting surveillance for approximately two (2) hours,
26 officers attempted to arrest Stubbs. Officer Ferron testified that Stubbs and another individual
27 attempted to escape in the vehicle in which Stubbs was riding as a passenger and that it crashed
28 during the attempt to flee. After the crash, Stubbs ran and was eventually taken into custody.

1 Officers located a weapon in the passenger side of the vehicle from which Stubbs fled. Officer
2 Ferron testified that he did not ever look at Stubbs' phone, he never received any data or
3 information specifically from the phone, and the basis for his knowledge of the second number
4 was the information being sent to his email address real time as a result of the first pen register.

5 The Court also heard testimony from Detective Richard Hart, an eighteen (18) year
6 veteran of the Las Vegas Metropolitan Police Department who has been assigned to the Major
7 Violators Unit for the previous ten (10) years. Hart testified that he was also asked to assist in
8 locating and arresting Stubbs. Hart testified that he received the same real time email information
9 from the search warrant that Officer Ferron had obtained from Phone No. 1. Detective Hart also
10 testified that this information led them to believe that Stubbs might be located at the Siegle Suites
11 on Martin Luther King Boulevard.

12 Detective Hart confirmed that investigation revealed Stubbs' mother lived at the Siegle
13 Suites, and authorities therefore set up surveillance in an attempt to locate Stubbs at that location.
14 Detective Hart confirmed that a number of detectives and officers were there on the surveillance
15 squad and that he too was receiving real time information from the pen register. Detective Hart
16 confirmed that the information is received in emails, the emails are routinely destroyed shortly
17 thereafter, but the information is maintained in logs that were admitted into evidence as Exhibit
18 C. Detective Hart confirmed Officer Ferron's testimony regarding their respective duties, and
19 that Officer Ferron continued the surveillance after his initial investigation.

20 Detective Hart testified that during the surveillance, a woman exited the apartment
21 thought to be where Stubbs' mother lived. Detective Hart testified that he approached the woman
22 and confirmed that she was Stubbs' mother. He and other officers asked her to confirm whether
23 or not Stubbs was there and she indicated he was not. Detective Hart indicated that he was one of
24 the officers who went into the apartment to search for Stubbs. He indicated that they were only
25 looking for Stubbs and did not find him. He further testified that they were not looking for a cell
26 phone and he never recalled seeing a cell phone. Detective Hart testified that he was not aware of
27 anyone finding a cell phone and did not believe anyone found anything of evidentiary value
28 inside the apartment. Detective Hart confirmed that the information regarding Phone No. 2 was

1 obtained from the real time information received from the previous pen register request and not
2 from Stubbs' phone.

3 **B. Stubbs' Witnesses**

4 Stubbs called two witnesses, Lori Winsor and Nonnie Midgette. They were in a
5 relationship at the time and residing at the Siegle Suite apartment in question. Winsor testified
6 that she is Stubbs' mother, but that he was not living with her at the time police searched her
7 apartment. Winsor confirmed that she was confronted by police when she took out garbage. She
8 indicated that she was questioned after they showed her their identification. Winsor testified that
9 she was not allowed to go into her apartment until after officers told her she could go back in.
10 She estimated it was approximately forty-five (45) minutes. She testified that she did not give
11 authorization for anyone to go into the apartment or for anyone to search the apartment. She
12 further testified that when she went back to the apartment, it looked a little different because a
13 storage closet where Stubbs kept property was left with the door open and property falling out.
14 However, she never testified that Stubbs kept a phone there or that a phone was missing.

15 Midgette testified via video conference that he was living with Winsor at the Siegle Suite
16 Apartments on the day in question. Midgette testified that he received a telephone call from the
17 police who told him to go outside. Midgette testified he complied and went outside but saw no
18 police. He indicated that when he walked downstairs he heard a call and realized it was the police
19 calling him. They motioned him to their location and took him behind a building. Midgette
20 testified police indicated they were looking for Stubbs and he replied that "Kevin doesn't live
21 here." Midgette testified that no one ever asked about going upstairs or to go into the apartment.
22 Midgette testified that he did not know that police had even entered the apartment until well after
23 the incident. Midgette further testified that he did not notice anything out of the ordinary when he
24 went into the apartment after they left, which is why he assumed that they had not gone into the
25 apartment.

26 **C. Exhibits**

27 The Court admitted into evidence, without objection, the following:
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- Government's Exhibit A: the warrant and order for a pen register/trap and trace with real time position location for Phone No. 1;
- Government's Exhibit B: the Las Vegas Metropolitan Police Department Communication Center Event Log outlining the investigation at the apartment of Stubbs' mother;
- Government's Exhibit C: the Report of Activity from the information received from the search warrant from Phone No. 1; and
- Government's Exhibit D: the search warrant and order and related documents for the pen register and trap and trace with real time position location for Phone No. 2.

Stubbs provided no exhibits.

III. LEGAL STANDARD AND ANALYSIS

A. Fourth Amendment

The Fourth Amendment addresses "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. It protects reasonable and legitimate expectations of privacy. *Katz v. United States*, 389 U.S. 347, 353 (1967). More specifically, the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also United States v. Wetselaar*, 2013 WL 8206582, at *10 (D. Nev. Dec. 31, 2013), report and recommendation adopted, 2014 WL 1366722 (D. Nev. Apr. 7, 2014).

The Fourth Amendment and its progeny is only triggered if and when law enforcement conducts a search or seizure. Thus, if the Court determines that law enforcement did not conduct a search or seizure of Stubbs' phone in order to obtain the second telephone number and thereafter locate Stubbs, then any Fourth Amendment inquiry is finished. Here, after considering the testimony and evidence presented at the evidentiary hearing, the Court finds unequivocally, that law enforcement did not search Stubbs' phone and the reference to same in the affidavit for

1 the second pen register was simply an error made by the younger officer who prepared and swore
2 out the affidavit for the second search warrant.

3 Stubbs does not contest the initial pen register request or the lawfulness of it as to Phone
4 No. 1. Indeed, the Court can see no basis to contest the probable cause for that warrant.
5 Moreover, the testimony was uncontroverted at the hearing that Exhibit C contained the real time
6 information that the officers were receiving as a result of that pen register. Thus, any information
7 that they may have received by searching Stubbs' phone was already provided to them in real
8 time as a result of the first pen register. Accordingly, the Court finds the officers' testimony to be
9 credible there was absolutely no need to search Stubbs' phone.

10 In addition, considering the evidence and testimony at the hearing, the Court is convinced
11 that they did not search the phone. Officer Ferron testified that he proceeded to the Siegel Suite
12 Apartments, met with management, reviewed another apartment for preparation of the search, and
13 thereafter participated in surveillance. Officer Ferron testified and Detective Hart confirmed that
14 he never went into the apartment with the other officers. Stubbs' witnesses did not contradict this
15 testimony. Thus, there is absolutely no evidence to support that Officer Ferron entered the
16 apartment or otherwise saw or seized a phone.

17 This finding is also confirmed by Stubbs' witnesses. Both witnesses confirmed that
18 Stubbs was not at the apartment on the day in question and had not been staying there. While
19 Stubbs' mother testified that a closet in which he stored property appeared to have been opened
20 and disturbed, she never mentioned a phone and never testified that Stubbs kept a phone at the
21 apartment. Moreover, Midgette testified that he did not see anything disturbed at all in the
22 apartment and did not know anyone had entered it during the period the police were there. His
23 testimony is notably silent regarding a cellular phone. So, the Court is convinced that Stubbs'
24 phone was not at the apartment at the time in question and therefore, could not have been
25 searched by law enforcement.

26 Accordingly, the Court agrees with the Government that Stubbs' phone was never
27 searched by Officer Ferron. It further agrees that the inclusion of the sentence in the affidavit for
28 the search warrant for Phone No. 2 (Exhibit D) that Stubbs "had left a phone at the residence"

1 was simply a mistake made by Officer Ferron. The next sentence, while inartfully drafted, states
2 that during the contact he observed the second phone number make three contacts with Stubbs'
3 phone. The officer could have clarified that information came from the first pen register
4 information it provided, but this failure to clarify does not support the inference that the
5 information was obtained as a result of the search of the phone. Likewise, mistakenly saying a
6 phone was left at the residence does not otherwise invalidate the warrant because even without
7 that sentence there is ample probable cause for the warrant. *See, e.g., United States v. Gibson*,
8 2017 WL 1401477, at *4 (D. Nev. Jan. 11, 2017) ("The effect of misrepresentations and
9 omissions on the existence of probable cause is considered cumulatively.").

10 The Court also agrees with the Government that given that no search of the phone
11 occurred, the Fourth Amendment inquiry ends. As such, the Court need not reach a decision on
12 whether or not the gun found at the time of Stubbs' arrest is a fruit of the poisonous tree or
13 whether the officers could have obtained the information from an independent source. Given that
14 no search of the phone occurred, the Court declines to analyze those issues as unnecessary.

15 **IV. CONCLUSION AND RECOMMENDATION**

16 In conclusion, because the Court finds that no search of Stubbs' phone occurred and that
17 the reference to finding a phone at the residence in the affidavit was simply an inaccurate
18 statement, the Court will recommend that Stubbs' motion to suppress any evidence seized at the
19 time of his arrest as fruits of the poisonous tree be denied.

20 **IT IS THEREFORE RECOMMENDED** that Defendant Stubbs' Motion to Suppress
21 Evidence (ECF No. 77) be **denied**.

22 **V. NOTICE**

23 This report and recommendation is submitted to the United States District Judge assigned
24 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
25 may file a written objection supported by points and authorities within fourteen days of being
26 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely

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1 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
2 1153, 1157 (9th Cir. 1991).

3 DATED: June 25, 2020

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5 DANIEL J. ALBRECHTS
6 UNITED STATES MAGISTRATE JUDGE
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